Supreme Court, U.S.
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No. 88-552

IN THE

Supreme Court Of The United States

October Term, 1988

ROBERT JOHN ARKO,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF THE AIR FORCE; THE SCHOOL OF EDUCATION, UNIVERSITY OF COLORADO; THE SCHOOL OF LAW, UNIVERSITY OF COLORADO; THE AMERICAN BAR ASSOCIATION; THE ASSOCIATION OF AMERICAN LAW SCHOOLS; THE LAW SCHOOL ADMISSION COUNCIL; and THE LAW SCHOOL ADMISSION SERVICES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS LAW SCHOOL ADMISSION COUNCIL AND LAW SCHOOL ADMISSION SERVICES, INC.

Elliot L. Richardson
(Counsel of Record)
Glenn S. Gerstell
1825 Eye Street, N.W., Suite 900
Washington, D.C. 20006
(202) 835-7500

Counsel for Respondents Law School Admission Council and Law School Admission Services, Inc.

Of Counsel:

Judith L. Osborn
Milbank, Tweed, Hadley & McCloy
1825 Eye Street, N W., Suite 900
Washington, D.C. 20006

Balmar Legal Publishing Division, Washington, DC 20005, (202) 659-3610

QUESTIONS PRESENTED

1. Whether the petitioner's case presents an important question of federal law which has not, but must be, settled by this Court.

2. Whether the lower courts abused their discretion in disallowing petitioner's motion to have his case reheard.

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OPINIONS BELOW

The District Court's order of February 27, 1987 is reported at 661 F. Supp. 31 (D. Colo. 1987). The order of the Court of Appeals affirming both the District Court's judgment of dismissal of February 27, 1987 and the order of May 11, 1987 is not yet officially reported but is reproduced on pages 1-5 of petitioner's appendix ("Pet. App.").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's claims are allegedly based on the Sherman Act, the Clayton Act, Article I, section 9, clause 3 of the United States Constitution and the Sixth Amendment.

STATEMENT OF THE CASE

After the District Court for the District of Colorado dismissed petitioner's case under Federal Rule of Civil Procedure 12(b)(6), and the Court of Appeals for the Tenth Circuit affirmed that dismissal and again rejected his two post-judgment motions, petitioner is now attempting to have his case heard by this Court in an effort to remedy the perceived harms he claims to have suffered over twenty years ago.

After graduation from the University of Colorado, petitioner took the Law School Admission Test ("LSAT") and applied unsuccessfully for admission to the University of Colorado Law School. He blames his rejection from that law school (and others) on the respondents in this case, including the Law School Admission Council ("LSAC") and the Law School Admission Services, Inc. ("LSAS")*, which are not-for-profit corporations that administer the LSAT and facilitate the admissions process for American and Canadian law schools. Although apparently first denied admission to law school in 1969 after his graduation from college, petitioner, a *pro se* litigant, waited some seventeen years later to file his complaint, which alleges the existence of a conspiracy to restrict the entry of Viet Nam veterans into the legal profession in violation of the "spirit" of the Sherman and Clayton Acts. (Pet. App. at 7).

The District Court, construing these facts in the light most favorable to the petitioner, found that petitioner had failed to state a claim upon which relief might be granted. It therefore

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* LSAC and LSAS have no parent companies, subsidiaries or affiliates, other than the other, to list pursuant to Rule 28.1.

granted respondents' motion to dismiss the complaint on February 27, 1987. On April 7 and April 24, 1987 petitioner filed two motions requesting relief from the judgment on the basis of what was claimed to be newly discovered evidence. The District Court found the evidence did not affect the prior judgment and rejected both motions in an order filed May 11, 1987. Petitioner then filed a notice of appeal on May 18, 1987. On February 23, 1988, the Court of Appeals affirmed the District Court's February 27, 1987 dismissal of the case and its order of May 11, 1987, finding that plaintiff's allegations did not state a federal cause of action and that the District Court had properly denied the motion for a rehearing.

REASONS FOR DENIAL OF THE WRIT

This case does not warrant review by this Court because it does not present any question of law deserving this Court's (or indeed any court's) attention. Moreover, the petitioner has failed to state any federal cause of action at all. In short, there is nothing to justify the grant of a writ of certiorari.

In addition, the rulings of the United States District Court of the District of Colorado and the United States Court of Appeals for the Tenth Circuit do not conflict with the rulings of this Court or another court of appeals on similar questions. In arriving at their decisions, these courts properly exercised their discretion and did not stray from the accepted course of judicial proceedings.

I. Petitioner's Case Does Not Involve Any Important Question of Federal Law.

Petitioner attempts to base his petition for a writ of certiorari on several federal questions that his case allegedly raises. However, none of his alleged federal questions -- namely, claims under the Sherman and the Clayton Acts, Article I, section 9, clause 3 of the United States Constitution and the Sixth Amendment -- has any foundation in law or fact. Petitioner's case

thus presents no important question of federal law that must be decided by this Court.

Petitioner alleged that LSAS and LSAC violated the spirit of the Sherman and Clayton Acts, but he has failed to prove that he has suffered any harm to those interests which the laws are intended to protect. Petitioner is not entitled to sue for damages under the federal antitrust laws because his "business or property" was not injured when he was denied admission to law school. *See* Clayton Act §4, 15 U.S.C. §15 (1982 and Supp. IV 1986). Admission to law school is not considered an entitlement; therefore no cognizable property interest was harmed when petitioner's applications were rejected. *See Selman v. Harvard Medical School*, 494 F. Supp. 603, 619-21 (S.D.N.Y.) (civil rights and antitrust claims), *aff'd mem.*, 636 F.2d 1204 (2d Cir. 1980). Furthermore, he fails to allege that future harm is possible to any interest that may be protected by a private suit for equitable relief under the Clayton Act. 15 U.S.C. §26 (1982 and Supp. IV 1986); *see Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods*, 497 F.2d 203, 217-18 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974). Finally, petitioner himself acknowledged in the District Court that his antitrust claim was meritless when he stated that it was raised only "in passing". Plaintiff's Opposing Memorandum at 11-12, *Arko v. United States Dep't of Air Force*, No. 86-F-1818 (D. Colo. Nov. 18, 1986) (partially reprinted in Pet. App. at 23, 30).

Equally meritless are petitioner's contentions that the proceedings below were the equivalent of a bill of attainder under Article I of the Constitution. "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867). It is clear from the record of the proceedings below, however, that no such legislative act was at issue in the District Court. Moreover, contrary to petitioner's allegations, the proceedings in the courts below afforded him every opportunity to have his claims heard and decided in full accordance with due process of law. The Court of Appeals was thus correct in rejecting this argument.

Nor does petitioner's argument that his Sixth Amendment right to counsel was violated in the District Court proceedings merit review by this Court. The Sixth Amendment provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense.

The purpose of the Sixth Amendment is "to ensure that criminal defendants receive a fair trial," *Strickland v. Washington*, 466 U.S. 668, 689 (1984); it does not require counsel for all civil litigants. In this case petitioner chose to represent himself rather than to retain counsel; LSAC and LSAS were in no way responsible for his choice. Petitioner cannot now claim that this right to counsel has been violated.

Even if all of petitioner's allegations were accepted as true, petitioner has failed to raise any significant federal question that merits review by this Court.

II. Petitioner Was Not Entitled to Relief from the Judgment Since the District Court and the Court of Appeals Acted Within the Scope of Their Discretion.

The District Court did not abuse its discretion when it declined to grant a new trial or relief from the judgment upon the petitioner's attempted introduction of new evidence. The petitioner's two post-judgment motions under Federal Rule of Civil Procedure 60(b) were addressed to the sound discretion of the District Court. The Court of Appeals was correct in not overturning the decision of the lower court, since it had not abused its discretion. *See* 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶60.30[1] (2d ed. 1987).

The evidence submitted by petitioner consisted of no more than several letters describing a family dispute involving the administration of a deceased relative's estate. Even if admissible, the evidence was not relevant to petitioner's case and could not conceivably have changed the outcome of the litigation. *See Marshall's United States Auto Supply v. Cashman*, 111 F.2d 140,

142 (10th Cir.), *cert. denied*, 311 U.S. 667 (1940). Moreover, the new "evidence" was not sufficient for the District Court to grant relief from the judgment under Federal Rule of Civil Procedure 60(b). The Court of Appeals thus made the only decision available to it when it affirmed the District Court's ruling.

CONCLUSION

After several years of litigation on utterly spurious claims, petitioner has failed to present any important question of federal law that must be decided by this Court. Indeed, petitioner has failed to raise any federal question whatsoever, and thus by definition this Court has nothing to decide. Moreover, in dismissing his motion for a rehearing or relief from the judgment, the lower courts acted within their sound discretion in accordance with accepted judicial procedure. Since petitioner has repeatedly failed to demonstrate that he is entitled to any relief on his unusual claims, several years of manifestly meritless litigation should be terminated. Accordingly, petitioner's petition for a writ of certiorari should be denied.

Dated: October 26, 1988

Respectfully submitted,

Elliot L. Richardson
(Counsel of Record)
Glenn S. Gerstell
1825 Eye Street, N.W., Suite 900
Washington, D.C. 20006
(202) 835-7500

Counsel for Respondents
Law School Admission Council and
Law School Admission Services, Inc.

Of Counsel:

Judith L. Osborn
Milbank, Tweed, Hadley & McCloy
1825 Eye Street, N.W., Suite 900
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